IN THE

Supreme Court of the United States

OCTOBER TERM, 1947.

No. 829.

CLARA SHAPIRO,

Petitioner,

—against—

ANNETTE SHAPIRO and UNITED STATES OF AMERICA,

Respondents.

ON PETITION FOR CERTIORARI TO CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

BRIEF OF RESPONDENT ANNETTE SHAPIRO IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

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Respondent, Annette Shapiro, respectfully shows unto this Court as follows:

I.

Summary statement of matter involved.

The petitioner in this proceeding seeks to obtain review of the judgment of the United States District Court for the Southern District of New York, affirmed unanimously by the United States Court of Appeals for the Second Circuit, by which it was determined that the respondent, Annette Shapiro, is entitled to the proceeds of a National Service Life

Insurance policy upon the life of her deceased husband, Jerry Shapiro (328-333).*

The policy was issued to the decedent on March 1, 1942, following his induction into the United States Army on February 26, 1941 (55). At that time the decedent was unmarried, and he designated his mother, the petitioner, as his beneficiary. Respondent and the decedent were married October 3, 1942 (54-55). On December 19, 1942, about a week following his commissioning as an officer, the decedent reported to Lieutenant Charles E. Dunn, Adjutant of the Battalion, I. R. T. C., Fort McClellan, Alabama, where he was stationed, stated that he wished to change the beneficiary on his National Service Life Insurance policy from his mother to his wife, and requested the form appropriate to that purpose (132-136). He was given a form entitled "Designation of Beneficiary", which he filled out, signed, and handed to Lieutenant Dunn for his countersignature. This was the only form of which Lieutenant Dunn had any cognizance (140). It contained no specific reference either to insurance or gratuity pay. It was then handed to the sergeant major, who was responsible for its reaching the message center for transmission to its proper destination** (138-140, P'ff's Ex. 2, 244-249). The decedent met his death in a fire in an army camp, on February 22, 1944 (55-56).

On or about May 10, 1944, the respondent, Annette Shapiro, filed her claim with the Veterans Adminis-

* Figures in parentheses refer to folios in the Record.

** The word "designation" appears in the record (140), but this is obviously a typographical error.

tration for the proceeds of her deceased husband's insurance policy (25). Pursuant to this application, the Administration, on June 14, 1944, addressed a request for information to the Adjutant General's Office, War Department. The concluding paragraph of the letter (P'ff's Ex. 4, 257) read as follows:

> "For settlement of this insurance, it will be appreciated if photostatic copies of all beneficiary designations by this officer, including W. D., A. G. O. Form 41, be furnished the Veterans Administration. If this officer signed any papers, such as a confidential information and data sheet, a Questionnaire, a Government Insurance Form or any such paper, please furnish the original or a photostatic copy of such papers."

The reply to this request enclosed a photostatic copy of the "Designation of Beneficiary" W. D., A. G. O., Form 41 (P'ff's Ex. 2, 244-249), the identical form which the decedent had filled out, signed, and caused to be transmitted.

The Veterans Administration had the power to waive any mere formalities. Its request for and acceptance of a photostatic copy of the original "Designation" constituted such a waiver. And even though it was received after the insured's death, it was none the less effective, in so far as the respondent's rights in the policy were thereafter involved.

Thus it appears beyond dispute, that the intention of the insured decedent, Jerry Shapiro, to change the beneficiary upon his insurance policy from his mother to his wife—from the petitioner to the respondent—was unequivocally expressed; and he did everything that could reasonably be demanded to effectuate that intention.

II.

The question presented.

This Court has iterated and reiterated the requirements essential to the granting of a writ of certiorari. We do bear in mind, however, its admonition in *Furness, Withy & Co. Ltd.* v. *Yang-Tsze Insurance Assn. Ltd.* (1917), 242 U. S. 430, that it was "incumbent upon counsel for both sides to see that the petition and reply thereto disclosed the real situation", and its observation, that "The oversight (in that case) has resulted in unfortunate delay and needless consumption of time". We propose, therefore, to examine the theory by which the petitioner seeks to justify her application, and ascertain, *first,* whether it is agreeable with the record, and, *second,* if it is, whether the theory and the arguments in its support can in any manner justify the issuance of a writ consistently with Rule 38 (*Rules of the Supreme Court of the United States*), and this Court's interpretation and application thereof in previous cases. Our first proposition is that

A. Petitioner's Theory Depends for its Authority upon an Actual Denial of the Record.

The petitioner must stand or fall in this proceeding by her ability successfully to defend her submission (Pet., p. 6, VII) that:

> "The *sole question* presented is whether a change of beneficiary of a National Service Life Insurance Policy may be effected by filing with the War Department a *designation of beneficiary of gratuity pay benefits payable in case of death,*

and without execution or filing with the Veterans' Administration of any change of beneficiary of the insurance." (Italics supplied.)

If this is the "sole question", and the petitioner must be deemed to have concluded herself under the Rules, then that part of the statement which we have italicized is a fiction—neither pure nor simple. Its import is that (a) There was no intention on the part of the decedent to change the beneficiary of his insurance, and (b) That, in consequence, there was no such intention concerning which he could take any action to give effect. Furthermore, the assumption is inherent that the insured decedent did a vain and futile thing. There is no evidence in the record which affords even a feeble prop for this hypothesis. The testimony, which we have summarized in our "Summary statement of matter involved" (*supra*), with copious citations to the Record, is its categorical refutation. And so the Courts below have determined. The District Court (Memo. of Dec., 303) observed:

> "In this case we have the two requisites: (1) expressed intention, and (2) an affirmative act having for its purpose the effectuation of this intention." (That is to change the beneficiary upon his life insurance policy from his mother to his wife.)

He says once more (305) that:

> "Since Shapiro was married and his wife living at the time he made out A. G. O. Form No. 41, she automatically was entitled to receive the six-months' gratuity pay benefit upon his death. No form was needed unless it was for his insurance. 10 U. S. C. A. 903."

Judge Augustus N. Hand, writing for the Circuit Court of Appeals (p. 118 of Opinion), remarked:

> "The findings of the trial judge that Shapiro had changed the beneficiary of his insurance policy are indubitably supported. It is most unlikely that when he signed Form No. 41 that he could have intended any other act than to change the beneficiary of his insurance policy. Not only was there compelling oral testimony to support this view, but the form actually signed was adequate in its language (fol. 120) for that purpose. Moreover, it was quite futile to use it to designate the beneficiary of the six months' gratuity because the widow would take in preference to the mother with or without any designation. Therefore, unless Shapiro was familiar with the complexities of the particular uses of the various army forms there was nothing to prevent his using the form given him when he wished to change the beneficiary of his insurance policy. Indeed, Lt. Dunn testified that at the time Form No. 41 was used he did not know it was intended by the War Department only to designate the beneficiary of the six months' gratuity payment and he knew of no other form for use for life insurance. This testimony of a disinterested witness is strengthened by all the probabilities of the situation. The trial judge was clearly justified in his tenth finding:
>
> 'Both the battalion adjutant, Lieutenant Dunn, and Lieutenant Shapiro believed at the time that Lieutenant Shapiro signed the form, and thereafter, that it was intended to, and did, change the beneficiary of Lieutenant

> Shapiro's National Service Life Insurance policy to his wife, the plaintiff herein.' "

Having, as we believe, demonstrated by the Record, and the findings of both the District Court and the Circuit Court of Appeals, the factual ineptitude of petitioner's "sole question", we respectfully submit our second suggestion, that

B. Petitioner Has Offered No Grounds for Her Application Within the Purview of Rule 38.

The "sole question" is not as asserted by the petitioner. For purposes of precision it may be presented in the following terms:

> Did the insured, or did he not, express his intention to change the beneficiary upon his life insurance policy?
>
> Did the insured, or did he not, by appropriate overt act, give effect to his intention?

Both the District Court and the Circuit Court of Appeals have answered these questions emphatically and affirmatively. What the petitioner now seeks is a review by this Court of an evaluation of testimony deemed by both those Courts to be incontrovertible. This Court has made it abundantly clear, and repeatedly, that it will not accept an appeal merely to review the findings of the Courts below upon evidence presented, even where there is material conflict. Here there is none.

We hesitate to elaborate the errors that pervade the petitioner's argument. They refute themselves. We trust our remaining submissions will find their apology in the burden which this Court has laid upon us to

"present with *studied accuracy, brevity and clearness* whatever is essential to ready and accurate understanding of points requiring (the Court's) attention." (Italics in text.) (*Furness* v. *Yang-Tsze &c. Assn., supra.*)

The investment of a particular issue with heterogeneous attributes, and its translation into the field of public importance, are enterprises as painful in their performance as they are unhappy in their results. Petitioner's exertions are no exception. We may be permitted some slight scepticism of her solicitude. It is asserted in substance (Pet., pp. 6-7):

1. That an important question of Federal Law has been incorrectly decided by the Circuit Court of Appeals for the Second Circuit;
2. That its decision is in conflict with that of *Bradley* v. *U. S.,* 143 F. (2nd) 573, and
3. That its decision has so far departed from the accepted rules of law as to call for the exercise of this Court's power of supervision.

It is difficult to relate these claims, even if they had any substance, to the "sole question" to which the petitioner has restricted herself. The first and third of these objections find their value in that they are substantial quotations from Rule 38. Since they have no support in the record their weight in this relation is to be measured by the sole criterion of the petitioner's authority.

The second proposition must be met by emphatic denial. In its support, the petitioner later (Pet'r's. Brief, p. 13) makes the rather reckless assertion that

"In principle, if not entirely on all the facts, the case at bar is indistinguishable from the *Bradley* case." If the parenthetical phrase is intended to suggest the factual identity of the two cases, we are not at all fearful that this Court will be misled. Any inability to distinguish the principles involved in the two cases can be attributed only to an incurable case of intellectual myopia.

The District Court, and the Circuit Court of Appeals, the latter with one dissenting judge, found in the *Bradley* case, that while the evidence disclosed an expressed intention, no overt act had been performed which was calculated to effectuate that intention. The rule, from which there has been no material departure in any case that has been brought to our attention, was applied in the *Bradley* case, as it was in the case at bar:

> In order that a change of beneficiary upon an insurance policy may be effected, there must exist two elements—Expressed intention, and action appropriate to the effectuation of the intention.

Neither of these can operate effectively of itself. The one is as essential as the other, the other as the one.

The petitioner appears in some manner to be dissatisfied with this established rule, and to seek from this Court an infallible guide through intricacies approaching the infinite. This is a counsel of perfection requiring nothing short of omniscience.

III.

The Veterans Administration received all the information necessary to enable it to make an appropriate decision.

The petitioner concludes "The question presented" (Pet., p. 6, VII.) with the assertion that the filing of a designation of pay benefits was "without execution or filing with the Veterans' Administration of any change of beneficiary of the insurance."

We have previously, if inferentially, adverted to this claim (Summary statement of matter involved, *supra*), and recited the facts concerning the source of the Administration's information. We observed that the Administration received from the Adjutant General's Office exactly what it requested—a photostatic copy of the form executed by the insured decedent for the purpose of changing his beneficiary. The information was received subsequent to the officer's death. Neither of these circumstances can defeat the wishes of the deceased officer. There is no claim on the part of the Government that it is in any manner prejudiced by the form of the information, or the delay in its receipt. The only one who has suffered by the delay is the respondent. The petitioner has, in fact, received a substantial sum by reason of the delay, to which she was not entitled.

The following cases are among those relied upon by the petitioner. We are happy to accept them. The insured in the case of *Collins* v. *U. S.* (1947), 161 F. (2d) 64, exhibited the executed change of beneficiary to his wife during his lifetime, leaving it

among his papers, so that it could be transmitted in the event of his death to the appropriate Governmental department. Finding that positive and effective action had been taken to give effect to an expressed intention, the Court (67) says:

> "The very narrow question in this case, then, is whether it was necessary to deliver the executed change of beneficiary to the company (sic) or at least mail it in during the life of the insured in order to constitute a valid change of beneficiary. This question must be answered in the negative. The books are replete with cases holding that a valid change of beneficiary was effected although the application for such change was not received by the company until after the death of the insured."

The Court goes on to discuss the paternalistic interest of the Government in members of the armed services, and proceeds (69):

> "In view of all this, it is unreasonable to conclude that the government intended to encircle the right to change the beneficiary with technicalities and make such a change difficult of accomplishment. It is more reasonable to assume that all the government intended to require was satisfactory evidence of the intent of the insured to change the beneficiary, together with satisfactory evidence showing positive action on his part to effectuate such intent, and that when once this is shown, legal technicalities relating to ministerial acts or perfunctory acts will be brushed aside in order to carry out the expressed will and intent of the insured soldier."

Roberts v. *U. S.* (1946), 157 F. (2d) 906, 909, likewise emphasizes the principle of liberality. The Court says:

> "It will be seen that the judgment below (against the widow-plaintiff) rests upon the absence of the change of beneficiary from the Government's files and upon the testimony of the uncle as to his conversations with the insured. It seems clear to us that these factors are insufficient to outweigh the clear and undisputed written evidence in the insured's admitted handwriting that he had designated his wife as beneficiary of the insurance policy, especially since these writings are supported by the disinterested testimony of the brother officer who assisted the insured to change the beneficiary and saw him execute the document and deliver it to the clerk at the Naval air base."

In both these cases the trial courts had adopted the narrow view urged upon us by the petitioner in this case, and were reversed by the Circuit Court of Appeals. The *Bradley* case was considered and distinguished in both instances.

IV.

A significant discrepancy.

We observe at this point, and respectfully invite the Court's attention to, an italicized passage in the Petition (Pet., p. 4, III. "The evidence."). This purports to summarize the testimony of Lieutenant Dunn on page 48 of the Record (142-144). We regret that we are unable to reconcile this with the

testimony as it appears in the text. It is stated by the petitioner that:

> "*Lieutenant Dunn . . . did not know whether the assured requested a form for designation of beneficiary of six months' gratuity pay from the clerk who gave him the form* (R. 48)."

On his direct examination Lieutenant Dunn stated (135):

> "Lieutenant Shapiro came in and said he was organized and wished to fill out the form changing the beneficiary on his insurance from his mother to his wife."

And in response to an interrogation on cross examination he said (R. 48, fol. 144):

> "I told the clerk to give him the form to change his beneficiary for his National Service Life Insurance."

It may be that there is some explanation for these discrepancies, but it is not our function to suggest it.

V.

The argument.

We have examined every case cited by the petitioner. We have no quarrel with any of them. A number of them have no peculiar application to the issues here presented. As to those which have, we accept for the purposes of this case the rule which they uniformly reiterate—that the effectuation of change of beneficiary upon a National Service Life

Insurance policy is conditioned upon intention expressed by the insured, accompanied by appropriately positive action. The District Court and the Circuit Court of Appeals have unanimously determined that the insured in this case fulfilled both these conditions. There can be no reasonable doubt of the justice of their decision.

Stripped of all that is specious, the petition and supporting argument amount to nothing more than a demand upon this Court that it review the findings of both Courts below upon testimony, all the material elements of which are uncontroverted and incontrovertible. It is, in effect, a plea for a re-evaluation of evidence. This is a burden which this Court has uniformly and consistently declined to accept.

VI.

Conclusion.

It is respectfully submitted that the petition for writ of certiorari should be denied.

All of which is respectfully submitted.

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